

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

TIMOTHY D. MCCLUNG,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting  
Commissioner of Social Security,

Defendant.

NO: CV-11-306-RMP

ORDER GRANTING  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT

**BEFORE THE COURT** are cross-motions for summary judgment, ECF Nos. 13, 16. The Court has reviewed the motions, the memoranda in support, the Plaintiff's reply memorandum, the administrative record, and is fully informed.

**JURISDICTION**

Plaintiff Timothy D. McClung filed applications for Supplemental Security Income ("SSI") and Social Security Disability Insurance ("SSDI") on May 22, 2008. (Tr. 19, 116-17, 118-20.) Plaintiff alleged an onset date of August 15, 2006, in both applications. (Tr. 116, 118.) Benefits were denied initially and on

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1 reconsideration. On August 17, 2009, Plaintiff timely requested a hearing before  
2 an administrative law judge (“ALJ”). (Tr. 92-93.) A hearing was held before ALJ  
3 Moira Ausems on May 19, 2010. (Tr. 42-70.) At that hearing, testimony was  
4 taken from vocational expert Deborah Lapoint; and the claimant, Mr. McClung.  
5 (Tr. 42.) Plaintiff was represented by attorney Dana Madsen. (Tr. 42.) On August  
6 6, 2010, ALJ Ausems issued a decision finding Plaintiff not disabled. (Tr. 19-30.)  
7 The Appeals Council denied review. (Tr. 1-3.) This matter is properly before this  
8 Court under 42 U.S.C. § 405(g).

### 9 **STATEMENT OF THE CASE**

10 The facts of this case are set forth in the administrative hearing transcripts  
11 and record and will only be summarized here. The Plaintiff was twenty-one years  
12 old when he applied for benefits and was twenty-three years old when ALJ  
13 Ausems issued her decision. The Plaintiff currently is unemployed and stays with  
14 friends. The Plaintiff last worked briefly as a late night janitor. (Tr. 51.) The  
15 Plaintiff describes myriad conditions that keep him from finding employment,  
16 including back pain and depression.

### 17 **STANDARD OF REVIEW**

18 Congress has provided a limited scope of judicial review of a  
19 Commissioner’s decision. 42 U.S.C. § 405(g). A court must uphold the  
20 Commissioner’s decision, made through an ALJ, when the determination is not

1 based on legal error and is supported by substantial evidence. *See Jones v.*  
2 *Heckler*, 760 F.2d 993, 995 (9th Cir. 1985) (citing 42 U.S.C. § 405(g)). “The  
3 [Commissioner’s] determination that a claimant is not disabled will be upheld if  
4 the findings of fact are supported by substantial evidence.” *Delgado v. Heckler*,  
5 722 F.2d 570, 572 (9th Cir. 1983) (citing 42 U.S.C. § 405(g)). Substantial  
6 evidence is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112,  
7 1119 n.10 (9th Cir. 1975), but less than a preponderance. *McCallister v. Sullivan*,  
8 888 F.2d 599, 601-02 (9th Cir. 1989) (citing *Desrosiers v. Secretary of Health and*  
9 *Human Services*, 846 F.2d 573, 576 (9th Cir. 1988)). Substantial evidence “means  
10 such evidence as a reasonable mind might accept as adequate to support a  
11 conclusion.” *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (citations omitted).  
12 “[S]uch inferences and conclusions as the [Commissioner] may reasonably draw  
13 from the evidence” will also be upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293  
14 (9th Cir. 1965). On review, the court considers the record as a whole, not just the  
15 evidence supporting the decisions of the Commissioner. *Weetman v. Sullivan*, 877  
16 F.2d 20, 22 (9th Cir. 1989) (quoting *Kornock v. Harris*, 648 F.2d 525, 526 (9th Cir.  
17 1980)).

18 It is the role of the trier of fact, not this court, to resolve conflicts in  
19 evidence. *Richardson*, 402 U.S. at 400. If evidence supports more than one  
20 rational interpretation, the court may not substitute its judgment for that of the

1 Commissioner. *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579  
2 (9th Cir. 1984). Nevertheless, a decision supported by substantial evidence will  
3 still be set aside if the proper legal standards were not applied in weighing the  
4 evidence and making a decision. *Browner v. Sec’y of Health and Human Services*,  
5 839 F.2d 432, 433 (9th Cir. 1988). Thus, if there is substantial evidence to support  
6 the administrative findings, or if there is conflicting evidence that will support a  
7 finding of either disability or nondisability, the finding of the Commissioner is  
8 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-30 (9th Cir. 1987).

### 9 SEQUENTIAL PROCESS

10 The Social Security Act (the “Act”) defines “disability” as the “inability to  
11 engage in any substantial gainful activity by reason of any medically determinable  
12 physical or mental impairment which can be expected to result in death or which  
13 has lasted or can be expected to last for a continuous period of not less than 12  
14 months.” 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also provides that a  
15 Plaintiff shall be determined to be under a disability only if his impairments are of  
16 such severity that Plaintiff is not only unable to do his previous work but cannot,  
17 considering Plaintiff’s age, education and work experiences, engage in any other  
18 substantial gainful work which exists in the national economy. 42 U.S.C.  
19 §§ 423(d)(2)(A), 1382c(a)(3)(B). Thus, the definition of disability consists of both

1 medical and vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156  
2 (9th Cir. 2001).

3 The Commissioner has established a five-step sequential evaluation process  
4 for determining whether a claimant is disabled. 20 C.F.R. § 416.920. Step one  
5 determines if he or she is engaged in substantial gainful activities. If the claimant  
6 is engaged in substantial gainful activities, benefits are denied. 20 C.F.R. §§  
7 404.1520(a)(4)(i), 416.920(a)(4)(i).

8 If the claimant is not engaged in substantial gainful activities, the decision  
9 maker proceeds to step two and determines whether the claimant has a medically  
10 severe impairment or combination of impairments. 20 C.F.R.

11 §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If the claimant does not have a severe  
12 impairment or combination of impairments, the disability claim is denied.

13 If the impairment is severe, the evaluation proceeds to the third step, which  
14 compares the claimant's impairment with a number of listed impairments  
15 acknowledged by the Commissioner to be so severe as to preclude substantial  
16 gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii); *see also* 20  
17 C.F.R. § 404, Subpt. P, App. 1. If the impairment meets or equals one of the listed  
18 impairments, the claimant is conclusively presumed to be disabled.

19 If the impairment is not one conclusively presumed to be disabling, the  
20 evaluation proceeds to the fourth step, which determines whether the impairment

1 prevents the claimant from performing work he or she has performed in the past.

2 If the plaintiff is able to perform his or her previous work, the claimant is not  
3 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At this step, the  
4 claimant's residual functional capacity ("RFC") assessment is considered.

5 If the claimant cannot perform this work, the fifth and final step in the  
6 process determines whether the claimant is able to perform other work in the  
7 national economy in view of his or her residual functional capacity and age,  
8 education and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),  
9 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

10 The initial burden of proof rests upon the claimant to establish a prima facie  
11 case of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921  
12 (9th Cir. 1971); *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial  
13 burden is met once the claimant establishes that a physical or mental impairment  
14 prevents him from engaging in his or her previous occupation. The burden then  
15 shifts, at step five, to the Commissioner to show that (1) the claimant can perform  
16 other substantial gainful activity, and (2) a "significant number of jobs exist in the  
17 national economy" which the claimant can perform. *Kail v. Heckler*, 722 F.2d  
18 1496, 1498 (9th Cir. 1984).

**ALJ'S FINDINGS**

ALJ Ausems found that the Plaintiff met the insured status requirement through June 30, 2008. (Tr. 21.) At step one of the five-step sequential evaluation process, the ALJ found that Plaintiff has not engaged in substantial gainful activity since August 15, 2006, the alleged date of onset. (Tr. 21.) At step two, the ALJ found that Plaintiff had the severe impairments of: (1) congenital L5 pars defect causing alleged chronic pain, (2) a depressive disorder, (3) post-traumatic stress disorder, (4) a personality disorder, and (5) poly-substance dependence. (Tr. 21-23.) The ALJ found that none of the Plaintiff's impairments, taken alone or in combination, met or medically equaled any of the impairments listed in Part 404, Subpart P, Appendix 1 of 20 C.F.R. (Tr. 23-24.) The ALJ determined that the Plaintiff had the RFC to perform light work subject to a wide variety of non-exertional limitations, including a limitation to semi-skilled work. (Tr. 24-28.) At step four, the ALJ found that the Plaintiff could not perform any relevant past work. (Tr. 28.) At step five, the ALJ, relying on a vocational expert, found that the Plaintiff could perform jobs that exist in significant numbers in the national economy. (Tr. 28-29.) Accordingly, the ALJ found that the Plaintiff was not under a disability for purposes of the Act. (Tr. 29-30.)

## ISSUES

Plaintiff argues that the ALJ erred by insufficiently addressing the opinions of Kayleen Islam-Zwart, Ph.D., and Judith Randall, Advanced Registered Nursed Practitioner (“ARNP”).

## DISCUSSION

### Medical Evidence

In evaluating a disability claim, the adjudicator must consider all medical evidence provided. A treating or examining physician’s opinion is given more weight than that of a non-examining physician. *Benecke v. Barnhart*, 379 F.3d 587, 592 (9<sup>th</sup> Cir. 2004). If the treating physician's opinions are not contradicted, they can be rejected by the decision-maker only with clear and convincing reasons. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). If contradicted, the ALJ may reject the opinion with specific, legitimate reasons that are supported by substantial evidence. *See Flaten v. Secretary of Health and Human Serv.*, 44 F.3d 1453, 1463 (9th Cir. 1995). In addition to medical reports in the record, the testimony of a non-examining medical expert selected by the ALJ may be helpful in her adjudication. *Andrews*, 53 F.3d at 1041 (*citing Magallanes v. Bowen*, 881 F.2d 747, 753 (9<sup>th</sup> Cir. 1989)). Testimony of a medical expert may serve as substantial evidence when supported by other evidence in the record. *Id.*

1 Historically, the courts have recognized conflicting medical evidence, the  
2 absence of regular medical treatment during the alleged period of disability, and  
3 the lack of medical support for doctors' reports based substantially on a claimant's  
4 subjective complaints of pain as specific, legitimate reasons for disregarding the  
5 treating physician's opinion. *Flaten*, 44 F.3d at 1463-64; *Fair v. Bowen*, 885 F.2d  
6 597, 604 (9<sup>th</sup> Cir 1989). The ALJ need not accept a treating source opinion that is  
7 "brief, conclusory and inadequately supported by clinical finding." *Lingenfelter v.*  
8 *Astrue*, 504 F.3d 1028, 1044-45 (citing *Thomas v. Barnhart*, 278 F.3d 947, 957 (9<sup>th</sup>  
9 Cir. 2002)). Where an ALJ determines a treating or examining physician's stated  
10 opinion is materially inconsistent with the physician's own treatment notes,  
11 legitimate grounds exist for considering the purpose for which the doctor's report  
12 was obtained and for rejecting the inconsistent, unsupported opinion. *Nguyen v.*  
13 *Chater*, 100 F.3d 1462, 1464 (9<sup>th</sup> Cir. 1996.) Rejection of an examining medical  
14 source opinion is specific and legitimate where the medical source's opinion is not  
15 supported by his or her own medical records and/or objective data. *Tommasetti v.*  
16 *Astrue*, 533 F.3d 1035, 1041 (9<sup>th</sup> Cir. 2008).

17 ***Dr. Islam-Zwart***

18 Dr. Islam-Zwart examined Mr. McClung on September 28, 2007. (Tr. 296.)  
19 Dr. Islam-Zwart performed a mental status exam, a personality assessment  
20 inventory, and other tests upon Mr. McClung. (Tr. 298-99.) Dr. Islam-Zwart

1 concluded that while Mr. McClung indicated “a history of acting out behaviors and  
2 depression,” those diagnoses were “for the most part resolved when [Mr.  
3 McClung] turned 18.” (Tr. 299.) Dr. Islam-Zwart identified a Global Assessment  
4 of Functioning score of 68 for Mr. McClung, which suggests only mild symptoms  
5 and generally good functioning. (Tr. 27, 299.)

6 Mr. McClung argues that the ALJ erred in rejecting Dr. Islam-Zwart’s  
7 opinion. Specifically, Mr. McClung asserts that the ALJ failed to address Dr.  
8 Islam-Zwart’s opinion that Mr. McClung was moderately limited in his ability to  
9 relate appropriately to co-workers and supervisors. Mr. McClung argues that  
10 because ALJ Ausems did not include a moderate limitation to relate to co-workers  
11 in her RFC, she implicitly rejected Dr. Islam-Zwart’s opinion.

12 ALJ Ausems addressed Dr. Islam-Zwart’s opinion. (Tr. 22, 27.) While ALJ  
13 Ausems did not specifically mention the checked box on the form finding a  
14 moderate limitation in dealing with co-workers, ALJ Ausems did incorporate a  
15 limitation that Mr. McClung should have “no more than occasional contact with  
16 the general public and coworkers.” (Tr. 24.) While Mr. McClung argues that his  
17 social limitations preclude work altogether, it was Dr. Islam-Zwart’s opinion in her  
18 narrative opinion that Mr. McClung appeared able to work. (Tr. 299.) ALJ  
19 Ausems’ opinion gives effect to the more detailed narrative provided by Dr. Islam-  
20 Zwart, while Mr. McClung’s argument extracts a single checkbox out of an eight-

1 page opinion. Accordingly, the Court finds that ALJ Ausems did not reject Dr.  
2 Islam-Zwart's opinion but instead incorporated Dr. Islam-Zwart's findings into a  
3 reasonable RFC. Furthermore, even if ALJ Ausems' failure to specifically address  
4 the checked box was error, such error was harmless where the checked box form  
5 was conclusory and contradicted the more thoroughly explained narrative opinion.  
6 *See Thomas v. Barnhart*, 278 F.3d 947, 957 (9th Cir. 2002).

7 ***Judith Randall, ARNP***

8 In addition to the opinion of Dr. Islam-Zwart, Mr. McClung argues that ALJ  
9 Ausems failed to properly consider the opinion of Judith Randall, ARNP. Ms.  
10 Randall opined that Mr. McClung suffered from lumbosacral spondylolysis that  
11 limited Mr. McClung to sedentary work. (Tr. 230.) The ALJ rejected Ms.  
12 Randall's opinion because Ms. Randall "was only a short term treating source, is  
13 not a specialist, is not an acceptable medical source, and the opinion is not  
14 supported by medically acceptable clinical findings and laboratory diagnostic  
15 techniques." (Tr. 27.) ALJ Ausems also noted that "the examination findings  
16 were essentially normal," the opinion contradicted Mr. McClung's testimony about  
17 his activities of daily living, the opinion is conclusive, the opinion contradicts the  
18 opinions of other examiners, and the opinion is based on Mr. McClung's self-  
19 reports, which are not credible. (Tr. 27-28.)

1 Ms. Randall, as an ARNP, is not an acceptable medical source. 20 C.F.R.  
2 § 404.1513(a). Mr. McClung asks this Court to assume that Ms. Randall was  
3 working with a physician when she produced her opinion. ECF No. 14 at 10.  
4 However, nothing in the record suggests that a physician signed off on Ms.  
5 Randall's report, and this Court will not assume facts that are not in evidence.

6 Opinions from non-acceptable medical sources may be entitled to less  
7 weight than opinions of acceptable medical sources. SSR 06-03p. Ms. Randall's  
8 opinion contradicts the opinion of an examining medical source. Mr. McClung  
9 was seen by consultative medical examiner Robert Bray, M.D. on April 25, 2009.  
10 (Tr. 255.) In addition to examining Mr. McClung, Dr. Bray reviewed Ms.  
11 Randall's opinion. (Tr. 256.) Dr. Bray opined that Mr. McClung would be able to  
12 lift and carry twenty-five pounds frequently and fifty pounds occasionally, directly  
13 contradicting Ms. Randall's finding that Mr. McClung was physically limited to  
14 sedentary work. (Tr. 260.)

15 A reviewing physician, Norman Staley, M.D., concurred with Ms. Randall's  
16 lumbosacral spondylolysis diagnosis but also concurred with Dr. Bray that Mr.  
17 McClung could regularly lift twenty-five pounds. (Tr. 262, 268.) Dr. Staley's  
18 opinion makes clear that a lumbosacral spondylolysis diagnosis does not always  
19 necessitate a finding that a patient is limited to sedentary work. Given that Ms.  
20

1 Randall gives no other reason to support her finding that Mr. McClung is limited to  
2 sedentary work, the ALJ is correct in finding Ms. Randall's opinion conclusory.

3 In light of the conclusory nature of Ms. Randall's opinion, the fact that it  
4 contradicts both examining and reviewing opinions from acceptable medical  
5 sources, and the fact that Ms. Randall is not an acceptable medical source, the  
6 Court finds that the ALJ provided germane reasons to discount Ms. Randall's  
7 opinion that are supported by substantial evidence and free of legal error.

8 Accordingly, **IT IS HEREBY ORDERED:**

9 1. The Plaintiff's motion for summary judgment, **ECF No. 13**, is **DENIED**.

10 2. The Defendant's motion for summary judgment, **ECF No. 16**, is

11 **GRANTED.**

12 3. **JUDGMENT** shall be entered for the Defendant.

13 **IT IS SO ORDERED.**

14 The District Court Clerk is hereby directed to enter this Order, to provide  
15 copies to counsel, and to close this file.

16 **DATED** this 12th day of November 2013.

17  
18 *s/ Rosanna Malouf Peterson*

19 ROSANNA MALOUF PETERSON  
20 Chief United States District Court Judge